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PROTECTION OF PUBLIC SERVICE ENTERPRISES FROM COMPETITION. — One of the most significant features of the modern law of public utilities has been the adoption of a new policy regarding the protection of the public service enterprise from competition.

Twentieth-century conditions, under which the great mass of the people are dependent upon the public utilities for their very existence, have demonstrated the impracticability of the old policy of free competition in the public service field, and have proved that its characteristic duplication of investment, organization, and operating expense is an economic waste, not only productive of high rates and inadequate service to the public, but frequently resulting in total abandonment of that service.[1] Necessity has overthrown prejudice until it has come to be recognized that there is as direct a public interest in insuring a safe, adequate, and efficient service by providing for the stability of the public utility enterprise as there is in protecting the public utility patron from exploitation.[2] This modern conception has found expression in the widespread enactment of Public Utilities Acts inaugurating a new policy of comprehensive public regulation in the public utility field.

The former policy of free competition in action has been admirably illustrated by the recent case of *United Railroads of San Francisco* v.

[1] See Attorney-General *v.* Walworth Light & Power Co., 157 Mass. 86, 87, 31 N. E. 482 (1892); Weld *v.* Board of Gas & Electric Light Commissioners, 197 Mass. 556, 558, 84 N. E. 101 (1908).

[2] Idaho Power & Light Co. *v.* Blomquist, 26 Idaho, 222, 241, 141 Pac. 1083 (1914).

City and County of San Francisco.[3] A street railway had accepted its franchise and built its system forty years before under a general law providing that no two railroad corporations should occupy and use the same street or track for a greater distance than five blocks. The franchise contained a similar provision. The company was held not entitled to an injunction to prevent the city from constructing a competing railway in the same streets on either side of its tracks, on the ground that this limitation was not intended to affect the city when constructing a municipal street railroad under a later statute and an amendment to the state constitution.[4] The court further decided that in so far as the harm to the utility was the inevitable consequence of the city doing what the franchise did not make it unlawful for it to do, that did not constitute such a taking of property as to require eminent domain proceedings.[5] No better example of the policy of "cut-throat competition" in the public utility field, with its attendant waste, could be imagined than this duplication of the plant, equipment, organization, and operating expense of a great metropolitan transportation system; and this, in order to give the same form of service in a similar manner over the same routes to the same public, for the very purpose of destroying the established utility.[6]

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[3] 249 U. S. 517 (1919).

[4] *Cf.* White *v.* City of Meadville, 177 Pa. 643, 35 Atl. 695 (1896), where on facts similar to this case the court, recognizing the economic waste from such competition, held it would not impute to the legislature an intent to permit such destruction of property without compensation from the mere fact that at the same session statutes were enacted providing for creation of water companies to serve municipalities, and also authorizing certain class cities to construct and operate their own water system, and therefore enjoined the municipality from competing with the privately owned water company which was giving a satisfactory service under contract.

In the San Francisco case, however, the later statute specifically authorized not only the paralleling of the roadway of the existing utility by the municipality, but also the use of its tracks. Act April 24, 1911 (CAL. STAT. 1911, c. 580).

[5] Although the municipal charter here required the city to consider offers for the sale of existing public utilities before constructing new ones, the court ruled that this did not aid the case in view of a general solicitation of offers for sale to the city of any existing street railway therein passed by the Board of Supervisors, and sent to the complainant among others, but in regard to which it seems to have taken no action. The case therefore stands as if there had been no such charter provision.

[6] From the time of the classic Charles River Bridge case (Charles River Bridge *v.* Warren Bridge), 11 Pet. (U. S.) 420 (1837), we find the public utility enterprise seeking legal protection from the competition of a similar utility. There the competition was allowed on the principle that a corporate charter which simply authorized the erection of a bridge and taking of tolls thereon conferred no exclusive privilege, but in the almost equally famous Binghamton Bridge case, 3 Wall. (U. S.) 51 (1865), the desired protection was secured, the statute of 1805 incorporating the established bridge and forbidding the erection of any bridge within two miles above or below it being held to constitute an inviolable contract even as against the state. However, following the decision in the case of Dartmouth College *v.* Woodward 4 Wheat. (U. S.) 518, 625 (1819), holding a corporate charter to be a contract between the state and the corporation, protected by the contract clause of the Federal Constitution, the states were careful to reserve their legislative power, hence the doctrine of the Binghamton case proved of little practical value to the public utility proprietor.

Where the competing utility is operating without lawful authority, either as beyond its corporate powers or for lack of a state or municipal permit or license, the courts have been quick to grant injunctive relief to the lawfully established utility. Citizens' Electric Illuminating Co. *v.* Lackawanna & Wyoming Valley R. Co., 255 Pa. 176, 99 Atl. 465 (1916); Memphis St. Ry. Co. *v.* Rapid Transit Co., 133 Tenn. 99, 179

In striking contrast is the modern policy as applied in *Chicago Motor Bus Co.* v. *Chicago Stage Co.*[7] In that case the state public utility commission had granted a certificate of convenience and necessity for a motor-stage service in a certain district of Chicago to a newly organized company in preference to an established company. The latter had expended a large sum in developing its business, and had for some time satisfactorily served other sections of the city. The action of the commission was set aside on appeal as arbitrary and unreasonable, in the absence of any evidence that the new company would render a better service to the public. Briefly stated, the court held that, assuming both applicants equally capable of rendering an adequate service, the established company should be preferred in view of its past services, its expenditures, and its experience in the local field.

Here we have a case involving the entrance of a public utility into an unoccupied field. To be sure, in Illinois, as in most jurisdictions, the modern statute[8] goes much further than protection of the established utility; it requires a certificate of public convenience and necessity from the state public utilities commission as a prerequisite to the right to serve a given territory whether already occupied or not. But the underlying policy is the same, for, as this common treatment suggests, from the viewpoint of the paramount public interest the two situations are fundamentally alike. With the recognition that the public interest is in general best advanced by protecting the existing utility from competition, it became equally plain that the public utility enterprise should not be permitted to enter an unoccupied field until there is a sufficiently developed public need to assure its probable support, and then only if it is so equipped with capital, skill, and credit as to be potentially capable of maintaining an adequate service at reasonable rates. If there is to be protection from competition, it is desirable that there arise no necessity of competition to meet the normally expanding requirements of the public.[9]

How may we account, then, for the decision in the San Francisco case? The explanation lies in the fact that in California by constitutional provision[10] not only are municipal utilities exempted from the jurisdiction of the state commission, but except as to rates, the privately owned utilities operating in municipalities may be, and usually are, also exempted.[11] The public utilities acts in a number of states likewise specifi-

S. W. 635 (1915); Bartlesville Elec. L. & P. Co. *v.* Bartlesville Interurban Ry. Co., 26 Okla. 457, 109 Pac. 228 (1910); Indianapolis Cable St. R. Co. *v.* Citizens St. R. Co., 127 Ind. 369, 24 N. E. 1054 (1890). *Semble*, Millville Gas Light Co. *v.* Vineland Light & Power Co., 72 N. J. Eq. 305, 65 Atl. 504 (1906). For case where state commission was held entitled to an injunction to prevent illegal supply of electricity to the public as beyond corporate power of the offending company and done without a certificate of public convenience and necessity, see Pub. Serv. Com'n of N. Y. (2d Dist.) *v.* J. & J. Rogers Co., 184 App. Div. 705, 172 N. Y. Supp. 498 (1918).

[7] 287 Ill. 320, 122 N. E. 477 (1919).

[8] Illinois Public Utilities Act, June 30, 1913, § 55 (HURD'S REV. STAT. 1915–1916, c. 111a).

[9] Chicago Motor Bus Co. *v.* Chicago Stage Co., 287 Ill., 320; 122 N. E. 477 (1919).

[10] Amendment of November 10, 1911, Art. 11, § 19, California Constitution, STAT. 1911, Part II, p. 2180.

[11] Amendment of November 3, 1914, Art. 12, § 23, California Constitution, STAT. 1915, p. lvi.

cally exempt from their provisions utilities owned and operated by municipalities.[12] This limitation upon the scope of the modern policy seems unfortunate in view of the need for uniformity of regulation of methods, service, and rates throughout the entire public utility field, and many states quite properly make no such distinction.[13]

There are two views of the legal nature of this modern policy. That most generally accepted treats it as substituting a régime of regulated monopoly for unrestricted competition;[14] the other considers it to be merely a modification of policy from free competition to regulated competition.[15] Indeed, these views seem to predicate an issue between regulated competition and regulated monopoly.

But why the issue? Take the normal situation of a single utility enterprise lawfully furnishing a particular public service to a given community. There, as Professor Wyman has well pointed out,[16] the facts present a condition of virtual, *i. e.* actual, monopoly; hence, so far as that utility is subjected to the jurisdiction of the state utilities commission, clearly it is regulated monopoly. Now assume the usual statutory requirement of a certificate of public convenience and necessity, and a second utility

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[12] Illinois Public Utilities Act, June 30, 1913, § 10 (LAWS OF ILL. 1913, p. 465); Pennsylvania Public Service Company Law, July 26, 1913, Art. I (PA. LAWS 1913, p. 1374); Michigan Public Utilities Commission Act, May 15, 1919, § 4 (PUBLIC ACTS 1919, p. 753).

The constitutionality of this exemption has come before the Supreme Courts of Illinois and Pennsylvania, the contention being that it violates the constitutional prohibition against grants of special privilege.

In the Springfield Gas & Electric Co. *v.* The City of Springfield, decided April 15, 1919 (15 Rate Research, 115), the Illinois Supreme Court held the exemption unconstitutional; but a rehearing has been granted and therefore the case has not been reported.

The Pennsylvania Supreme Court upheld the constitutionality of the exemption in Consolidated Ice Co. *v.* City of Pittsburgh, decided January 5, 1920.

[13] REPORT OF NATIONAL CIVIC FEDERATION COMMISSION ON PUBLIC OWNERSHIP AND OPERATION, Part I, Vol. I, p. 26—Municipal and Private Ownership of Public Utilities.

The Indiana Public Utilities Act of 1913, § 97 (BURNS' ANN. STAT. 1914, § 10052, u. 3), includes both municipal and privately owned utilities and expressly provides against such duplication as that in the San Francisco case by giving the municipality the right to take over the existing utility enterprise by eminent domain proceedings.

The administrative experience of the state public utilities commissions has shown that, tested by actual conditions, the public interest demands that the public service enterprise, whether privately owned or the subject of municipal ownership, should be brought within the provisions of the public utilities acts and the jurisdiction of the commissions, since they present the same fundamental problems. *Re* Village of Schenevus (N. Y. Pub. Serv. Com'n, 2d Dist.), P. U. R. 1919 E, 735 (certificate denied to municipality to establish plant to compete with existing public utility); Mackay Light & Power Co. (Idaho Pub. Util. Com'n), 15 Rate Research, 227 (1919) (certificate granted to privately owned utility to compete with municipal plant); *Re* Borough of Kittanning (Pa. Pub. Serv. Com'n), P. U. R. 1919 F, 182 (certificate denied to municipality until established utility had notice and opportunity to comply with its duty). The Pa. Pub. Serv. Co. Law 1913, Art. III, § 2 (PA. LAWS 1913, p. 1388), expressly includes proposed municipal corporation utilities within the provisions of the certificate of public convenience and necessity clauses.

[14] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, 1911, preface, p. ix., and §§ 33, 156; Idaho Power & Light Co. *v.* Blomquist, 26 Idaho, 222, 141 Pac. 1083 (1914).

[15] Farmers' & Merchants' Co-operative Tel. Co. *v.* Boswell Tel. Co., 119 N. E. (Ind.) 513 (1918).

[16] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, 1911, § 36, and chap. IV.

seeking to enter that field to provide a similar service. Is it not equally apparent that in placing the determination of whether this competition shall be allowed or not in the power of the state commission the result is a situation of regulated competition? Thus the truth of each view must be admitted when looked at in conjunction with the facts to which it properly applies; and since in the actualities of life these two situations work in harmony with each other, there seems to be no reason in the nature of things why the respective theories resting upon them should not be reconciled and the modern policy made to fulfill its broad purpose. It is submitted that neither the one interpretation nor the other can be adopted as the exclusive criterion. Nothing short of both functioning in coöperation will suffice to protect the public interest. In other words, the modern policy looking to comprehensive regulation is a synthetic policy, possessing the dual aspect of regulated monopoly and regulated competition.[17]

It is strange that the adherents of the theory of regulated monopoly seem to consider the certificate of convenience and necessity clause, characteristic of the modern policy, as proof of their contention. They base their argument on the evident assumption that monopoly is thereby legalized and a right of monopoly introduced into the law of public utilities.[18] The words of those clauses indicate the fallacy of such a construction, for they expressly place the public interest above every other consideration and reserve to the commission the power to permit competition if it may reasonably be deemed necessary under the circumstances.[19] It follows that neither the grant of such a certificate to a particular utility, nor its refusal to a second utility seeking to enter an occupied field, creates a legal monopoly in favor of the fortunate utility. Thereafter, as before, the monopoly remains one of fact and not as of legal right.[20]

Again, to regard the grant or refusal of such a certificate as conferring an exclusive legal privilege would react to defeat the chief aim of the

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[17] Thus far the courts have adhered to the broad spirit of the modern policy irrespective of which of these views they considered it to represent, but the danger lies in repetition being taken for precedent to the destruction of its true purpose. A warning against this very thing was sounded in the case of State *ex rel.* Electric Co. of Missouri *v.* Atkinson, 275 Mo. 325, 204 S. W. 897 (1918).

[18] REPORT OF NATIONAL CIVIC FEDERATION COMMISSION ON PUBLIC OWNERSHIP AND OPERATION, Part I, Vol. I, p. 26. — Municipal and Private Ownership of Public Utilities: "Public utilities, whether in public or private hands, are best conducted under a system of *legalized* and regulated monopoly."

[19] This is particularly well brought out in the Tennessee Railroad and Public Utilities Commission Act, Feb. 21, 1919, § 7 (PUBLIC ACTS 1919, p. 149), which provides: "That no privilege or franchise hereafter granted to any public utility . . . shall be valid until approved by said commission, such approval to be given when, after hearing, said commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest. . . ." For the correct construction of such a clause see State *ex rel.* Electric Co. of Missouri *v.* Atkinson, 275 Mo. 325, 204 S. W. 879 (1918).

[20] Farmers' & Merchants' Co-operative Tel. Co. *v.* Boswell Tel. Co., 119 N. E. (Ind.) 513 (1918). In an analogous case, Gill *v.* Dallas (Texas Civ. App.), 209 S. W. 209 (1919), a city ordinance forbidding operation of jitneys within a certain district was held not unconstitutional as creating a (legal) monopoly in favor of a street railway company operating under municipal license therein, since such license was revocable at will.

modern policy,—promotion of the public interest,—for it would hamper progress in the public service field and render impossible that approximation to the advancement of science and invention which has been the feature of the wonderful development of the public utility. The draftsmen of the modern statute wisely foresaw that only a flexible policy would meet the needs of the situation, and that the way must be left open for the public to benefit promptly by discoveries of new forms of public service.[21] This was accomplished by a general restriction of protection from competition to service of a similar kind.[22] However, the newly introduced form of service was also subjected in most jurisdictions to the requirement of a certificate of convenience and necessity in order to make sure that the public would be benefited by its installation under the circumstances then and there prevailing.[23]

Virtual monopoly must not be confused with complete monopoly; rather is it a relative matter representing a normal condition of substantial monopoly under the circumstances.[24] To treat the modern policy as one of legal monopoly is inconceivable, for not only must the policy adapt itself to admit competition between different types of public service, but there are many other forms of competition from which as a practical matter it is impossible to protect the public utility enterprise. This fact has been emphasized by the recent era of rate increases throughout the public service field. The consumer's potential power of competition, which had been quite lost sight of, suddenly sprang into vital prominence. This the street railways found in their attempts to derive an increased revenue from increased rates in the face of the former passenger's foot and private automobile competition.[25] Again, the compe-

[21] The competition between different types of public service supplying the same general need figured prominently in Public Service Commission of Washington *v.* Puget Sound Gas Co. (Wash. Public Serv. Com'n), P. U. R. 1918 F, 728. The commission said (p. 729): "In the main we can attribute this loss [in consumption of gas] to but one thing, and that is the great development in hydroelectrical energy and the cheapness of its productivity. Probably in no other line of activity has inventive genius played a greater rôle in the last decade than in the electrical field. There was a time when it appeared as if the Welsbach burner would bring gas for lighting purposes into general use. Following this invention, however, appeared the Tungsten electric lamp, which, owing to its low consumption of electric energy . . . relegated gas as a lighting factor, and has left it only in the field as a heat; and in this field it has, as never before, hydroelectric energy as a competitor. . . . This commission is not much concerned with competition between two distinct sources of energy; their efficiency is beyond our control; thus we should not be too much concerned when a newly developed form of producing energy displaces some older form. . . ."

[22] The Indiana Public Utilities Act of 1913, § 97 (BURNS' ANN. STAT. 1914, § 10052, t. 3), only requires a declaration of public convenience and necessity where a utility enterprise seeks to serve a municipality in which another public utility is lawfully engaged in a similar service.

[23] The Pennsylvania Public Service Company Law, July 26, 1913, Art. III, § 2 (PA. LAWS 1913, p. 1388), requires a proposed public utility enterprise to obtain approval of the public service commission to its incorporation, and in addition that it obtain the certificate of public necessity and convenience before it exercises any rights under any franchise, municipal grant, etc. Fagan *v.* Pittsburgh Transportation Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 E, 990.

[24] 32 HARV. L. REV. 170.

[25] *Re* Northampton, Easton & Washington Traction Co. (N. J. Board Pub. Util. Com'rs), P. U. R. 1919 A, 867 — foot competition; *Re* Massachusetts N. E. St. Ry. Co. (N. H. Pub. Serv. Com'n), P. U. R. 1919 F., 603 — private automobile competi-

tition of the people by a shifting of patronage [26] from one form of a public service to another, for example from the street railway to the steam railroad,[27] or from both to the jitney,[28] has proved a very effective weapon of defense against higher rates in spite of the modern policy. And always lurking in the background is the competition from various forms of private business, the wood lot, the coal yard, and the kerosene cart, ever ready competitors of the luckless gas plant.[29]

It must be recognized that protection of the public utility enterprise from competition can, of necessity, be but an incident in the new policy of comprehensive regulation for the conservation of the public interest which so admirably adapts itself to the actualities of the business facts.

TAXES MEASURED BY WEALTH. — The theory that foreign chattels have a *situs* at the domicile of the owner so as to be taxable there is now fallen into disrepute;[1] where such a tax is imposed it is properly viewed as a personal tax, the amount of which is determined by the wealth of the subject.[2] The practice of measuring taxation by wealth, however, may be subject to constitutional limitation. In the case of a tax on property the fundamental law of the states usually requires that the amount taken be fixed by the value of the thing taxed.[3] On the other hand, if the tax is *in effect* either a privilege tax or a tax on the person,[4] the method of fixing the rate is not thus limited by constitutional prescription. "Due process of law" and the "equal protection of the laws" do not demand absolute equality of taxation,[5] and privilege and personal taxes will not run foul of these guarantees unless unnecessarily unfair,[6]

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tion; also: Milk and Cream Rates to Philadelphia, Pa., 45 I. C. C. Rep. 379 (1917) — automobile truck and wagon competition with steam railroad.

[26] Bedford-Fulton Telephone Co. *v.* Chapmans Run Mutual Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 A, 911 — holding commission had no authority to prevent a patron changing to a competing public service company.

[27] *Re* Interurban Railroads (Ind. Pub. Serv. Com'n), P. U. R. 1919 F., 192 — competition between interurban and steam railroads; *Re* Massachusetts N. E. St. Ry. Co. (*supra*, note 25) — steam railroad competition with street railway.

[28] *Re* Union St. Ry. Co. (Mass. Pub. Serv. Com'n), P. U. R. 1919 C, 900 — competition between jitneys and street railway; *Re* Pearl (Nevada Pub. Serv. Com'n), P. U. R. 1919 F, 299 — auto-truck competition with steam railroad; *Re* King (Cal. Railroad Com'n), P. U. R. 1919 F, 377 — competition of auto stage with steam railroad; *Re* Increased Freight Rates (Ind. Pub. Serv. Com'n), P. U. R. 1918 F, 304 — competition of auto-transportation with interurban electric railways.

[29] This was pointed out in Pub. Serv. Com'n of Washington *v.* Puget Sound Gas Co. (Washington Pub. Serv. Com'n), P. U. R. 1918 F, 728, where the commission said: "We have here a contest between the coal mine, the forest, and the hydroelectric plant, on one hand, and gas upon the other."

[1] Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224 (1861).

[2] See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590.

[3] See JUDSON ON TAXATION, § 438, and appendix, pp. 760 *et seq.*

[4] Although the legislature may have had in mind the kind of tax which was beyond its constitutional power, if the courts can uphold the tax on some other theory as to its nature, they will do so. See Nicol *v.* Ames, 173 U. S. 509, 515 (1899). See JUDSON ON TAXATION, § 519.

[5] See BEALE ON FOREIGN CORPORATIONS, §§ 508, 509, 465; JUDSON ON TAXATION, § 450; GRAY, LIMITATIONS OF TAXING POWER, § 1122.

[6] Hatch *v.* Reardon, 204 U. S. 152 (1907); People *ex rel.* Farrington *v.* Mensching,